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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 1411

CITY OF CHICAGO IN TRUST FOR THE USE OF SCHOOLS,
Respondent,

vs.

ALBERT J. SCHOESCH REALTY CO., INC., ET AL.,

NATIONAL BANK OF ALBANY PARK IN CHICAGO, AS TRUSTEE UNDER TRUST No. 11-1030, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO EXCHANGE NATIONAL BANK OF CHICAGO AS TRUSTEE UNDER TRUST No. 15166; AND LA SALLE NATIONAL BANK OF CHICAGO, AS TRUSTEE UNDER TRUST No. 35232, SUCCESSOR IN INTEREST TO JOHN PRZYWARA AND JOSEPHINE PRZYWARA, HIS WIFE,
Petitioners,

Consolidated With

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Petitioners.

BRIEF AND APPENDIX FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

JAMES W. COFFEY,
FRANK S. RICHEIMER,
228 North La Salle Street,
Chicago, Illinois 60601,
Attorneys for Petitioner.

FRANK S. RICHEIMER,
RICHARD E. GIBARD,
Of Counsel.

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INDEX.

	PAGE
Map	Opposite page 2
Opinions Below	2
Question Presented	3
Constitutional and Statutory Provisions	3
Statement of the Case	4
Description of the Property	4
Hearings on the Different Motions to Dismiss	6
Parcel E Motion	6
Parcel C and D Motions Before Remand	6
Hearings on Motions to Dismiss as to Parcels B, C and D After Remand.....	7
The Claim for Severance Damage	10
Reasons for Denying Writ	12
A. Petitioners Have Failed to Show Constitutional or Any Other Federal Rights Were Violated by the Holdings of the Illinois Courts That There Was No Severance Damages	12
B. Illinois Courts Have Heard and Properly Ruled on Petitioners' Motion to Dismiss the Condemnation Proceedings and Held That the Board Could Acquire the Subject Property for a School Site. No Substantial Federal Question Exists	18
Conclusion	23
Appendix	A1

TABLE OF CASES.

City of Chicago v. Vaccarro, 408 Ill. 587, 596, 97 N. E. 2d 766 18

City of Chicago in Trust for the Use of Schools v. A. J. Schorsch Realty Co., 95 Ill. App. 2d 264, 238 N. E. 2d 426 ..... 2, 18

City of Chicago in Trust for the Use of Schools v. Blanton, 15 Ill. 2d 198, 201, 154 N. E. 2d 242 ..... 15, 17

Deerfield Park District v. Development Corp., 22 Ill. 2d 132, 174 N. E. 2d 850 21

Illinois Iowa Power Co. v. Rhein, 369 Ill. 584 19

Keogh v. Peck, 316 Ill. 318, 328, 147 N. E. 266 ..... 14, 17

Pittsburgh, Ft. Wayne and Chicago Railway Co. v. Sanitary Dist., 218 Ill. 286 19

Poole v. City of Kankakee, 406 Ill. 521 19

Rindge Co. v. Los Angeles County, 262 U. S. 700, 67 L. Ed. 1186, 1193 ..... 19, 22

Trustees of Schools v. Sherman Heights Corp., 20 Ill. 2d 357, 169 N. E. 2d 800 21

U. S. v. Carmack, 329 U. S. 230, 91 L. Ed. 209, 67 S. C. 252 20

Waukegan Park District v. First National Bank of Lake Forest, 22 Ill. 2d 238, 174 N. E. 2d 824 21

Zurn v. City of Chicago, 389 Ill. 114 19

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BRIEF AND APPENDIX FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

OPINIONS BELOW.

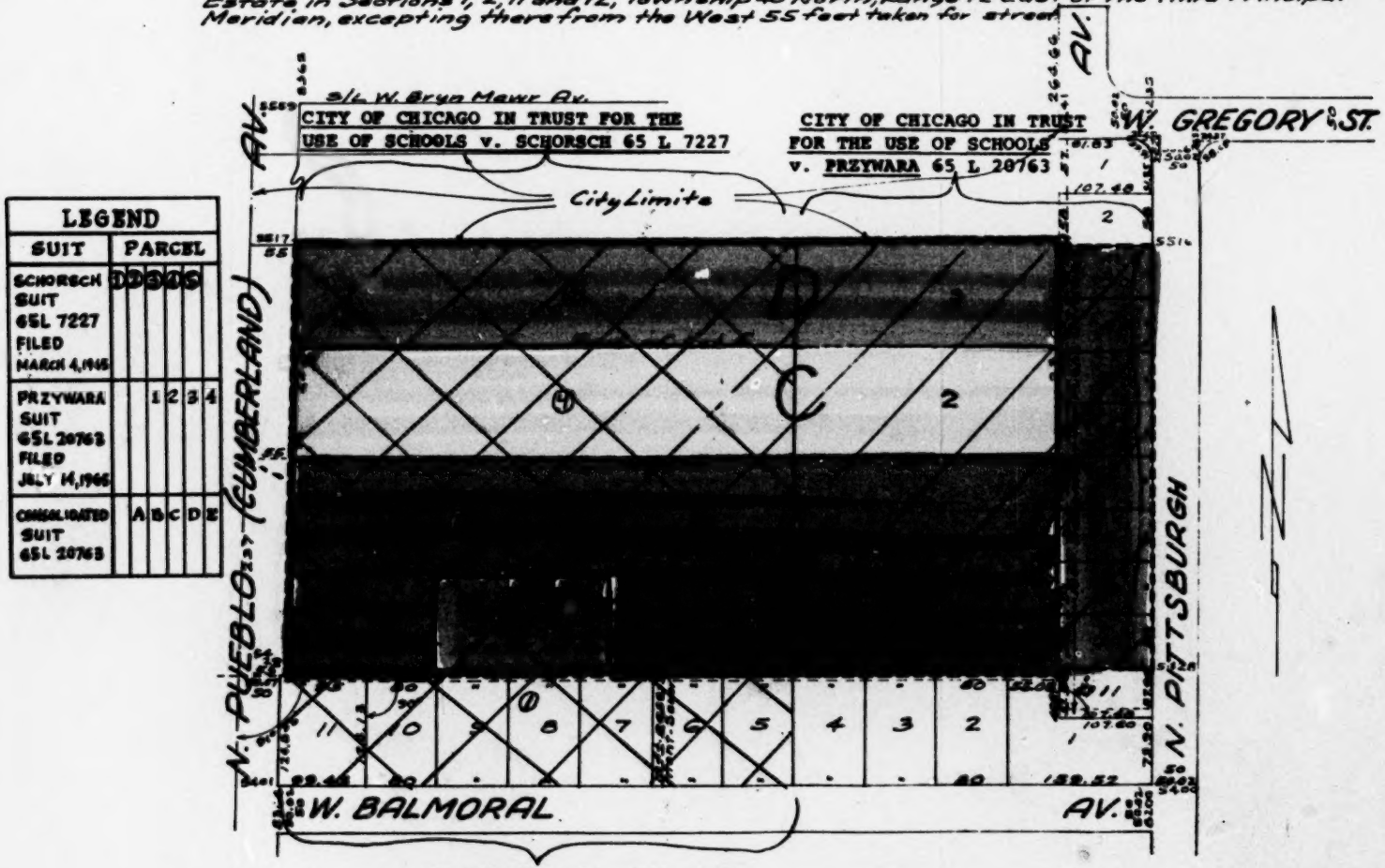
The Petition for Writ of Certiorari involves the judgments of the courts of review and trial courts of Illinois. The opinions below appended to the Petition for Writ of Certiorari involved the question of the Board of Education's right to acquire three of the five condemned parcels, B, C and D, for an elementary and high school site. (Please see map of school site on opposite page.) The very same question was also passed upon as to the fourth parcel in the site, parcel E, in a separate opinion of the Illinois Appellate Court in the same case, *City of Chicago in Trust for the Use of Schools* v. *A. J. Schorsch Realty Co.*, 95 Ill. App. 2d 264, 238 N. E. 2d 426, petition for leave to appeal to the Illinois Supreme Court denied. Said opinion is not appended to the Petition for Writ of Certiorari and we therefore append hereto a copy of that court's opinion, pp. A1-A. 15. The owner of parcel A in the school site never contested the Chicago Board of Education's right to take the property.

DATE
Apr. 15, 1965

Lots 3 to 10, inclusive, in Resubdivision of Lots 101 to 144, both inclusive, and Lot 100 (except the North 470 feet thereof) in Witwicki's 2nd Addition to Glen-Eden Estates being a Subdivision of part of the Northeast quarter of Section 11 and part of the Northwest quarter of Section 12, all in Township 40 North, Range 12, according to the plat thereof recorded April 26, 1956 as Document No. 16562104, East of the Third Principal Meridian, in Cook County, Illinois,

Also

The North 474.03 feet of the South 1054.50 feet of Lot 6 of the Subdivision of James Pennoyer's Estate in Sections 1, 2, 11 and 12, Township 40 North, Range 12 East of the Third Principal Meridian, excepting therefrom the West 55 feet taken for street.



DISMISSED AUGUST 13, 1965
7 LOTS, PARCEL D, SCHORSCH CASE



QUESTION PRESENTED.

In the absence of any showing of a substantial federal question will the Supreme Court of the United States grant Certiorari merely to review the holdings of the state courts that the Board of Education proceeded properly and in due form to acquire by condemnation the subject property for the elementary and high school site and that there was no severance damages in the case.

CONSTITUTIONAL AND STATUTORY PROVISIONS.

There is no constitutional or statutory provision involved. No claim is made that the Eminent Domain Act of Illinois is unconstitutional.

STATEMENT OF THE CASE.

We respectfully submit the following statement of the facts as to the ownership and location of the subject property at the time the condemnation suit was filed on July 14, 1965, and the Board's determination of the location of the site for the school which determination has been upheld without exception by the Illinois Courts. The respondent makes the following statement of the case to correct inaccuracies and supply omissions in the petitioners' statement.

The Board, after considering other sites, finally determined to acquire by condemnation the five parcels making up 10½ acres as shown on the plat appended hereto necessary and required for an elementary school and a high school site in the area and thus make provision for schooling from kindergarten through twelfth grades. No charge was ever made that this school selection was made as a matter of malice, caprice or because of any ulterior motives harmful to the owners of the condemned property. Its location was never challenged.

DESCRIPTION OF PROPERTY.

The Board brought condemnation proceedings on July 14, 1965 after inability to acquire by direct purchase the 10½ acres which consisted of five parcels, A, B, C, D and E, three of which, B, C and D were unsubdivided acreage fronting on Cumberland Avenue on the west. Parcel A was also unsubdivided but had no frontage on Cumberland. The fifth, parcel E, consisted of 8 vacant inside subdivided lots fronting on North Pittsburgh Avenue on the east and adjoined parcels B, C and D on the west.

At the time the suit was filed the size and ownership of these parcels were as follows: Parcel A, one-half acre, formerly part of parcel B, improved with a brick and frame house owned by Joseph and Irene Rusek, daughter of the owner of parcel B. (Record in Case No. 54685, Add'l Abst. p. 18.) Parcel B, 4.2 acres improved with a forty year old frame house of little value owned by John and Josephine Przywara (Parents of Irene Rusek) (Record in Case No. 54685, Abst. p. 4); Parcel C, 2.3 acres vacant owned by Mitchell Kobelinski and Ted Szywala with title in Albany Park Bank, Trustee under Trust No. 11-1030 (Record in Case No. 54685, p. 518, Add'l Abst. p. 19); Parcel D, 2.3 acres with old frame house, owned by Walter and Florence Branda with title in Exchange National Bank, Trustee under Trust No. 15166 (Record in Case No. 54685, Abst. p. 7); and parcel E, being eight vacant subdivided lots each 58 feet in width and approximately 107 feet in depth owned by Edwin Witwicki with title in Western National Bank of Cicero, Trustee under Trust No. 498.

The development around the subject parcels is practically all residential.

For more than five years as a result of trials, hearings and appeals the proceedings to acquire these five parcels for school site have been in constant litigation. The Board has acquired and now has use of parcels A and E but is still awaiting the end of this pending litigation for the acquisition and use of parcels B, C and D constituting as shown on the attached plat 90% of the chosen school site.

THE BOARD OF EDUCATION DID NOT ABUSE ITS DISCRETION IN THE EMINENT DOMAIN CASE NOR WERE THE PETITIONERS PREVENTED BY THE ILLINOIS COURTS FROM PRESENTING ISSUES AND EVIDENCE BEARING ON ITS EXERCISE OF SUCH RIGHT.

Hearings on the Different Motions to Dismiss.

PARCEL E MOTION.

The first effort in the case to defeat the plan of the Board of Education to acquire the property in question was made in relation to parcel E. The owner of that parcel filed a motion to dismiss, was granted a change of venue and his attorneys, the same attorneys representing petitioners herein, began and carried on in support of said motion discovery proceedings of practically every kind. Months were spent involving court hearings, discovery actions and answering petitions and interrogatories in the trial court before Judge Donovan on the motion to dismiss the condemnation proceedings as to parcel E. The testimony of many witnesses was heard and dozens of exhibits were admitted into evidence. After hearing the testimony, examining the exhibits and hearing arguments of counsel the trial judge overruled the motions to dismiss as to parcel E and the trial on the question of compensation proceeded resulting in an award fixing just compensation. On appeal to the Appellate Court the rulings of the trial court on the motions to dismiss were affirmed as to parcel E. The opinion of the Appellate Court in this related case is not appended to the Petition for Writ of Certiorari, but we have appended a copy of it hereto. (Please see Appendix hereto at pp. A. 1 to A. 15.)

PARCEL C AND D MOTIONS BEFORE REMAND.

Subsequent to the rulings of the trial judge on the parcel E traverse the attorney who represented the owner of parcel

E also filed a motion to dismiss as to parcel C and sought leave to file another word for word identical motion to dismiss as to parcel D in the part of the case pending before a different trial judge. That trial judge was of the opinion that there was no need to again go through the extensive hearings as to parcels C and D when the same motion to dismiss was previously made on the same grounds and had been fully heard and ruled upon as to parcel E, especially since petitioners herein waited over a year after suit was filed before attempting to file the parcel C and D motions to dismiss. On motion of the Board the parcel C and D motions to dismiss were stricken and the trial on the question of compensation proceeded and resulted in a judgment fixing the amount of compensation as to parcels A, B, C and D. On appeal the ruling of the trial judge denying the motion to dismiss as to parcel E was affirmed but the court held that the owners of parcels C and D were also entitled to file and have a hearing on their motions to dismiss the condemnation suit notwithstanding the grounds of the motions were the same as those for parcel E.

HEARINGS ON MOTIONS TO DISMISS AS TO PARCELS B, C, AND D AFTER REMAND.

On remand petitioners herein continuing their resistance to the condemnation proceedings for the first time filed a motion to dismiss as to parcel B and were allowed to file amended motions as to parcels C and D. All three motions were identical and petitioners again served lengthy requests upon the Board to admit facts. These were answered and the facts given but petitioners' motions to dismiss the suit, however, were objected to by the Board as totally insufficient at law and the Board moved to strike such motions. Summarized, the motions to dismiss were based on the following grounds: (1) Preliminary plans for construction for a school or type of school were not

made; (2) The taking was excessive; (3) No reports, surveys or other basis why plaintiffs should proceed in this suit differently than in the two suits heretofore dismissed appear of record; (4) Plaintiff did not consult the Chicago Plan Commission; and (5) Plaintiff has kept from the record information which entered into its exercise of discretion in seeking to acquire the school.

After a hearing for the better part of a day the trial judge, Judge Egan, a different judge than the one who passed on the motions to dismiss in the first trial, heard extensive arguments by counsel and having before him the Board's answers to petitioners' discovery request, entered an order striking certain portions of the motions to dismiss and setting down for further hearing the balance of the motions to dismiss. At the subsequent hearing documentary evidence and oral testimony was received and the trial court after hearing the arguments of counsel overruled all petitioners' motions to dismiss. (Please see Appellate Court Opinion, Case No. 54685, Appendix to Petition for Writ of Certiorari, pp. A. 8-A. 13). The case then proceeded to trial on the matter of compensation. After judgment was entered fixing the compensation petitioners herein appealed the judgment directly to the Supreme Court of Illinois on the grounds that they did not receive "such a hearing on their motions to dismiss and their motions . . . to file a cross petition, so as to fulfill the minimal requirements of due process". In that matter the Supreme Court entered the following order in the case on November 19, 1969:

> "On this appeal from a judgment in an eminent domain proceeding appellants claim that they were denied due process of law by reason of the fact that the trial court held that certain portions of their motion to dismiss the proceedings should be stricken. It is also contended that the court erred in certain rulings concerning the value of the property.

> "There is no substantial constitutional question presented and on the Court's own motion the cause is transferred to the Appellate Court, First District."

The Appellate Court upon such transfer received the extensive briefs of the parties, heard oral arguments and affirmed the judgment of the trial court. The Appellate Court in affirming the Board's right to take the property in question cited and quoted from decisions which have long held that the matter of selecting a school site is not subject to judicial review in the absence of fraud, caprice or similar conduct none of which are charged in the case at bar. (Please see Appellate Court Opinion, Case No. 54685, appended to the Petition for Certiorari, pp. A. 8-A. 13.) Thus, the same Appellate Court that on the first appeal had ordered the hearing on the petitioners' motions to dismiss, on the second appeal affirmed the rulings of the trial court, thereby holding that the trial court had given a full hearing on the motions to dismiss as ordered on the first appeal as to parcels B, C and D.

The Petitioners' Petition for Leave to Appeal that judgment of the Appellate Court was denied by the Supreme Court of Illinois. Thereafter petitioner filed a motion in the Supreme Court to reconsider its ruling. This motion was also denied by that court.

We have pointed out the details of the litigation relating to the motions to dismiss upon which petitioners herein contend, with no support for them in the record in this case, that they have not received a hearing. As shown by the foregoing, no statement could be more incorrect and it is contradicted by the statement of the Appellate Court in its opinion (Please see Appendix to Petition for Certiorari, pp. A. 8-A. 13). The hearings which petitioners claimed herein were never afforded to them were subsequently found by the Appellate Court to have been given

to them by the trial court after the remand. Petitioners' Petition for Leave to Appeal this Appellate Court judgment was denied by the Supreme Court of Illinois.

THE ILLINOIS COURTS PROPERLY DENIED THE CLAIM OF THE PETITIONERS HEREIN THAT THEY WERE DEPRIVED OF THE RIGHT TO SEVERANCE DAMAGES SINCE THEY WERE NOT THE OWNERS OF A LARGER SINGLE TRACT THAN THAT WHICH WAS DESCRIBED IN THE CONDEMNATION SUIT.

The Claim for Severance Damage.

Petitioners' contention in their Petition, p. 10, that a portion of a tract has been taken and under the Constitution they should have received severance damages to remainder is predicated on the false premise that they were parties to an agreement which gave them an ownership interest in parcel D and which they erroneously called an "installment purchase contract". The Illinois Courts on the contrary have held consistently in these proceedings that said agreement was not an "installment purchase contract" but an option contract and that on the date of the filing the condemnation suit herein petitioners had no interest in parcel D.

In order to correct petitioners' misstatements of ownership and other erroneous statements in their petition that the condemnation proceedings at the time suit was filed involved a taking of part of a larger single tract belonging to Petitioners Kobelinski and Szywala, we submit the following facts shown by the record in the case and the pertinent provisions of the option agreement.

On November 20, 1962 and prior to the filing of the condemnation proceedings an agreement (Please see Appendix to Petition for Certiorari, p. A. 45) was entered into between the Brandas, owners of parcels C and D and

Petitioners Kobelinski and Szywala. Under the terms of that agreement Kobelinski and Szywala were given the option to purchase one-half of the property designated as parcel C in this suit and described in the agreement as the southwest one quarter of the "north 237.03 feet of the South 1054.50 feet of Lot 6 (except the West 55 feet thereof) in Subdivision of estate of James Pennoyer in Sections 1, 2, 11 and 12, Township 40 North, Range 12, East of the Third Principal Meridian, in Cook County, Illinois", by payment on or before May 1, 1963 of $30,000 with interest; and the option to purchase the other half of parcel C, the southeast one-quarter of the aforesaid legally described property by payment on or before May 1, 1964 of $30,000; and an option to purchase one-half of the property designated in this suit as parcel D and described in the agreement as the northeast one-quarter of said legally described property by payment May 1, 1965 of $30,000 and the option to purchase the other half of the property designated as parcel D in this suit and described in the agreement as the northwest one-quarter of said property by payment on May 1, 1966 of $30,000.

It was further provided by the terms of the option agreement that separate deeds and separate title insurance policies would be delivered for each of the four separate parts of the property if and when payment was made as provided in the agreement. Paragraph 13 of the agreement provides that on failure to make any such payment when due and if such default continue for 15 days beyond the due date that said default shall terminate the agreement. Petitioners herein, Kobelinski and Szywala (or the Bank Trustee holding title for them) were not obligated in any way to purchase any or all of parcel D, the unpurchased remaining real estate holding of the Brandas at the time of filing the suit (Please see Appendix to Petition p. A. 45).

At the time of the filing of the Petition to Condemn on July 14, 1965, Kobelinski and Szywala had elected to and had acquired both halves of parcel C and title thereto was held under a land trust for them by the National Bank of Albany Park. But neither of the two parts of parcel D had been paid for or acquired by them leaving parcel D still owned by the Brandas, with title in the Exchange National Bank of Chicago under Trust No. 15166. Neither Kobelinski nor Szywala, then, at the date of the filing the suit, had any interest in parcel D.

REASONS FOR DENYING THE WRIT.

A. Petitioners Have Failed to Show Constitutional or Any Other Federal Rights Were Violated by the Holdings of the Illinois Courts That There Was No Severance Damage.

In their attempt to circumvent the requirement in a case brought to the Supreme Court of the United States on Petition for Writ of Certiorari of a showing that a substantial federal question is involved petitioners have misstated facts in their statement of the case as to the fundamental question of ownership of the parcels and the location thereof and erroneously argued in their petition for certiorari, p. 10, that the condemned parcels C and D and the 5-acre tract north of D not being condemned is a tract under "unified equitable ownership" and that "since a portion of the tract has been taken" petitioners should have been entitled to severance damages for the remainder. The fallacy of that contention is first, that in their statement of the case, p. 5 of their petition, the location of the parcels is incorrectly stated in that petitioners claim the five acre tract for which they claim damages is immediately north of parcel C; second, that the petition, p. 11, erroneously characterizes the option agreement

as an "installment sales agreement". The facts are: (1) the five acre tract not taken is immediately north of parcel D, not parcel C (shown on the plat on p. 2 herein) and parcel D was not owned by the petitioners herein at the time the condemnation proceedings were instituted but on the contrary was owned by the Brandas; (2) the agreement in question is an option agreement not an "installment sales agreement" as the holders of the option were in no way required to purchase any part of the property and did not purchase parcel D or any part thereof herein prior to the date of filing condemnation suit nor until approximately two years or more thereafter. They were not bound to acquire said parcel or refrain from so doing. This court need look no further than the terms of the agreement itself set forth verbatim in the Appendix to the petition for writ of certiorari and we respectfully call the court's attention in particular to the provisions on p. 45 of the Appendix.

The Illinois Supreme, Appellate and Trial Courts found the said agreement completely clear and unambiguous and left no doubt as to the fact that the petitioners did not own parcel D at the time the condemnation suit was filed. (Please see Appellate Court Opinion, Appendix to Petition for Writ p. A. 22.) Petitioners' claim that they had the right to go on the property by virtue of the provision in the option agreement that they could make surveys or plats of subdivision, take said tests and other temporary privileges such as collecting rent from one old frame building on the property all of which was mere privilege granted. Such privilege was expressly made by the agreement subject to the exclusive and completely retained right of seller in the property except as to any part thereof actually bought and paid for by the optionee. In other words all they had was a courteous temporary privilege until they paid the purchase price.

The Courts of Illinois have decided that the petitioners' option to purchase parcel D from the Brandas did not give them legal or equitable interest in that parcel at the time of filing the condemnation petition and therefore would not support a claim for damages to other property not taken and not adjacent to parcel C.

Petitioners have failed to show that the decisions of the Illinois Courts in the case at bar have been decided in a way not in accord with the applicable decisions of this Court. There is no dispute that at the time condemnation proceedings were brought parcel C was owned by Kobelinski and his partner with title held in trust by a bank; that parcel D was owned by Walter and Florence Branda with title in trust in another bank; that petitioners herein did not acquire ownership of parcel D until two years after the suit to condemn was filed.

The Illinois Courts gave consideration to the petitioners' contention that because the owner of parcel C had an option to purchase parcel D that said owner of C had sufficient interest on which to base a claim for damages to the five acres north of parcel D and the Appellate Court held that such an option to purchase gives no interest in said parcel D following the long established rule set forth in *Keogh* v. *Peck,* 316 Ill. 318, 328, 147 N. E. 266, where the court said:

> "An option, originally, is neither a sale nor an agreement to sell. It is simply a contract by which the owner of property agrees with another person that he shall have the right to buy his property at a fixed price within a time certain. *The owner does not then sell his land or any interest in it.*" (Emphasis added.)

The holder of the option could either pay for the property and acquire it or refrain from doing so as he saw fit and the agreement is therefore of a kind always held to be an option contract and not a real estate sales contract.

As the court said in *City of Chicago in Trust for the Use of Schools* v. *Blanton,* 15 Ill. 2d 198, 201, 154 N. E. 2d 242:

> "We concur in this decision. By the terms of the agreement the vendee, but not the vendors, was free to either accept the property at the stipulated price or reject it *in toto* and forfeit the paid consideration. Whether the option would at any time be exercised so as to subject vendee to the same specific performance and damage obligations as were incumbent upon the vendors, was entirely within the former's discretion. Such being the case, the so-called real-estate contract was essentially an option agreement and subject to the principles of law applicable thereto."

In line with the decisions in the above cited cases the Supreme, Appellate and Trial Courts have all consistently ruled that there is no basis for the claim of defendants in the case at bar for any damages. Petitioners nevertheless continue to claim severance damages but they fail to cite any new matters not previously argued to and rejected by Illinois Courts. They cite no pertinent cases or any other authorities but instead refer to decisions which involve present existing vested rights in land like leasehold estates (*Department of Public Works and Buildings* v. *Diel,* 89 Ill. App. 2d 130, 232 N. E. 2d 133; *Chicago and Evanston R. R. Co.* v. *Dresel,* 110 Ill. 89; *The People* v. *Shedd,* 241 Ill. 155, 89 N. E. 332; *Department of Public Works* v. *Bohne,* 415 Ill. 253, 113 N. E. 2d 319) or valid and enforceable real estate sales contracts, not option agreements (*Stevenson* v. *Loehr,* 57 Ill. 509; *City of Chicago in Trust for the Use of Schools* v. *Robertson,* 43 Ill. App. 2d 24, 198 N. E. 2d 192; *State Highway Comm.* v. *Miller,* 155 N. W. 2d 780; *South Dakota* 1968 and *Pierce County* v. *King,* 287 P. 2d 316, Washington, 1953. In *Johnson, et al.* v. *F. and M. Ry. Co.,* 111 Ill. 413, cited by petitioners herein it was conceded by the parties and so stated in the court's opinion that the adjoining property taken was owned by the defendant and cross

petitioners and adjoined other property of his, part of which was taken. The record in the case at bar on the other hand shows that petitioners had no interest in parcel D but were mere holders of an option to purchase it which the Illinois Courts always have held does not give the holder any interest in the real estate. In *Shay* v. *Penrose,* 25 Ill. 2d 447, 185 N. E. 2d 218; cited by petitioners the seller retained a right of forfeiture of the real estate in the event the buyer failed to perform his convenants including that of making the specified required payments which he was bound to make under a valid enforceable sales contract not an option agreement as in the case at bar where the buyers were not obliged to take or pay for all or any part of the property and *Shay* is therefore not relevant.

Chicago, Santa Fe and Cal. Ry. Co. v. *Ward,* 128 Ill. 349, cited by petitioners, involved the condemnation of defendant's coal yard and his existing, vested interest which the record showed he owned in adjoining property at the time condemnation proceedings were filed by recorded deeds of conveyance, recorded agreements and other documents reciting that defendants had an undivided half interest in adjoining property. There was no deed of conveyance, recorded agreement or other such document creating a vested existing interest in parcel D in the case at bar as there was in the *Ward* case. The unexercised option agreement as to parcel D gave petitioners no existing vested interest or interest of any kind in parcel D under the repeated holdings of Illinois courts in the *Keogh* and the *Blanton* cases cited above. The *Ward* case is therefore not relevant. We repeat, Petitioners cite no decision of the United States Supreme Court contrary to the holdings of the Illinois courts in the case at bar.

Petitioners argue that the Board of Education's action in the case at bar was not consistent with the 14th Amendment citing *Chicago Burlington and Quincy Railroad* v.

City of Chicago, 166 U. S. 226, 234, 235, 41 L. Ed. 979. In that case by order of the City Council of Chicago, a street was extended across railroad track right-of-way. Petitioners herein quote from the opinion of Mr. Justice Harlan to the effect that a taking of property without compensation is a denial of due process of law and contrary to the 14th Amendment and any rule of law prescribed by a court in disregard of the owner's right to compensation is likewise in violation of the Constitutional Amendment. The Board has no quarrel with such a fundamental principle of American jurisprudence but we wish to point out that the Supreme Court in *Burlington and Quincy,* contrary to petitioners' contention made in the case at bar, found there was no constitutional violation of the rights of the owner railroad. We respectfully submit it has been heretofore shown that in the instant case any possible damage to the five acre tract north of parcel D depended on whether the owner of parcel C had any ownership interest in parcel D at the time the condemnation proceedings were instituted. As we have previously shown at the time of filing the condemnation suit the Petitioners owners of parcel C merely had an option to purchase parcel D and did not own it. *Keogh* v. *Peck,* 316 Ill. 318, 328, 147 N. E. 266; *City of Chicago* v. *Blanton,* 15 Ill. 2d 198, 201, 154 N. E. 2d 242.

This is a condemnation suit to acquire five separately owned parcels of real estate in their entirety leaving no remainder on which a severance damage claim could be based. The fact the parcel C owner also owned another parcel, the five acre tract north of D not included in the taking, is no basis for severance damages since parcel C and the north five acre tract not taken were neither contiguous or jointly used but in fact were separated by the separately owned parcel D belonging to the Brandas and therefore there was no single tract in the case at bar, part

of which was taken, leaving a remainder for which severance damage could be claimed. The cases cited by petitioners, *United States* v. *Miller,* 317 U. S. 369, 87 L. Ed. 336; *United States* v. *Welch,* 217 U. S. 333, 54 L. Ed. 787, 30 S. C. 527; *United States* v. *Grizzard,* 219 U. S. 180, 55 L. Ed. 165, 31 S. C. 162; *United States* v. *Dickinson,* 331 U. S. 745, 91 L. Ed. 1789, 67 S. C. 1382 hold that when a part of a single tract is taken, the owner is entitled to recover severance damages to the remainder and are therefore irrelevant.

B. Illinois Courts Have Heard and Properly Ruled on Petitioners' Motion to Dismiss the Condemnation Proceedings and Held That the Board Could Acquire the Subject Property for a School Site. No Substantial Federal Question Exists.

The selection and acquisition of the public school site here involved was in the discretion of the Board of Education. In *City of Chicago for the Use of Schools* v. *Schorsch Realty Co.,* 95 Ill. App. 2d 264, 238 N. E. 2d 426 (Please see Appendix hereto pp. A. 1 to A. 15), the Appellate Court of Illinois upheld the determination by the Board to acquire the subject school site. The Board is the public body expressly granted by statute the power to acquire by Eminent Domain, property for public school purposes, which, it is undisputed, it resolved to do in the case at bar by official action taken at a regular meeting of the Board of Education pursuant to statute. It is undisputed that these condemnation proceedings were instituted pursuant to Board action.

It is a long established rule of law in condemnation that the exercise of the power to condemn is a legislative and not a judicial question. Among the many cases so holding is *City of Chicago* v. *Vaccarro,* 408 Ill. 587, 596, 97 N. E. 2d 766 where the court said:

"This court has held in an unbroken line of decisions that where the right to condemn exists, and the property is subject to the right of eminent domain and is being condemned for a public use, and the right to condemn is not being abused, courts cannot deny the right to condemn on the ground that the exercise of the power is unnecessary or not expedient, as the determination of that question devolves upon the legislative branch of the government and is a question which the judicial branch of the government cannot determine; and that in such cases courts may only rightfully determine whether a petitioner has the power to exercise the right of eminent domain, whether the property is subject to the right of eminent domain and is being taken for a public use, whether the power is being abused, as by the taking of an excessive amount of property, and other kindred questions which do not involve a determination of the necessity or expediency of the taking of the lands sought to be condemned. (*Poole* v. *City of Kankakee*, 406 Ill. 521; *Pittsburgh, Ft. Wayne and Chicago Railway Co.* v. *Sanitary Dist.*, 218 Ill. 286.) The general rule is that where the legislature has delegated to a corporation the authority to exercise the power of eminent domain, the corporation has also the authority to decide on the necessity for exercising the right, and its decision will be conclusive in the absence of a clear abuse of the power granted. (*Zurn* v. *City of Chicago*, 389 Ill. 114; *Illinois Iowa Power Co.* v. *Rhein*, 369 Ill. 584; *Chicago, Milwaukee and St. Paul Railway Co.* v. *Franzen*, 287 Ill. 346.)"

This court has consistently held that "The necessity for appropriating private property for public use is not a judicial question . . . . 'where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the State may designate. They are jurisdictional questions no matter who may be charged with their decision, *and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment.*'" (Emphasis added) (*Rindge Co.* v. *Los*

Angeles County, 262 U. S. 700, 67 L. Ed. 1186, 1193). To the same effect is *U. S.* v. *Carmack,* 329 U. S. 230, 91 L. Ed. 209, 67 S. C. 252.

We repeat that no statement or evidence was ever brought into this case that the Board of Education's selection of the subject parcels for a school site was not an excellent choice to meet the needs of the community it will serve.

The Board directly and amply proved its right to take the property when challenged by petitioners' motions to dismiss herein and petitioners were given full opportunity and complete hearing to present all applicable evidence offered by them. In our statement of the case we have pointed out for the court's consideration the facts regarding the Board's efforts over the last six years to acquire these parcels and we respectfully submit that the courts of Illinois properly ruled in upholding the right of the Board to put public schools on these parcels. Notwithstanding the judgments of the Illinois Trial, Appellate and Supreme Courts in the case at bar, the petitioners here argue that where there are questions as to the sufficiency of Eminent Domain proceedings or the authority to condemn, the burden of proof is upon the taking body to make prima facie proof of the disputed averments, citing *U. S.* v. *Nudelman,* 104 F. 2d 549, 551; *Board of Trustees of Southern Illinois University* v. *Lange,* 28 Ill. 2d 229, 190 N. E. 2d 789, 790; *Board of Education* v. *City of Chicago,* 402 Ill. 291, 83 N. E. 2d 714. In the *Lange* and *Board of Education* cases, the condemning bodies put in no proof whatsoever to make out prima facie cases when objection was made by traverse or motion to dismiss.

The situation in the case at bar is different. There not only was in evidence the Board's answers to interrogatories regarding the steps taken by it to select the school site but also the adopted Resolution of the School Board

reciting the necessity of the taking of the parcels in question and its judgment to condemn same and also oral evidence by the Board of Education's Assistant in Charge of School Facilities Planning (Please see Case No. 54685, Record p. 1082; Abst. p. 122) regarding the selection and necessity of the parcels for use for grammar and high school site. The Board's Resolution itself which was offered by it and admitted into evidence without objection established a prima facie case for the necessity of the taking under the long established rule in Illinois that a prima facie case is made out for the necessity of the taking by the introduction of the ordinances of the condemning body. *Waukegan Park District* v. *First National Bank of Lake Forest,* 22 Ill. 2d 238, 174 N. E. 2d 824; *Deerfield Park District* v. *Development Corp.,* 22 Ill. 2d 132, 174 N. E. 2d 850; *Trustees of Schools* v. *Sherman Heights Corp.,* 20 Ill. 2d 357, 169 N. E. 2d 800. Not one word of evidence was offered by the petitioners to controvert the evidence of witnesses or action of the Board on this subject.

The *Nudelman* case cited by petitioner had nothing to do with the point for which petitioners cite it, as it merely held that a trial court in exercising its discretion may, after a reasonable period of time given for filing same, bar the filing of motions to dismiss condemnation proceedings.

In the case at bar when after a hearing defendants' motions to dismiss were denied, counsel for the defendants made an oral perfunctory motion for leave to amend their motions to dismiss which motion was denied by the trial judge. The Appellate Court (Appendix to Petition, p. A. 13) properly found that the denial of the motion to amend was within the Trial Court's discretion and there had been no abuse of its discretion, especially since the motion to amend came after a full hearing on the petitioners' motions to dismiss and the defendants failed to disclose any additional grounds which would have served as a basis for up-

holding the motions to dismiss. Petitioners also cite *United States* v. *Carmack*, 329 U. S. 230, 243, 245, 91 L. Ed. 209, 67 S. C. 252 which involved the taking by the federal government of municipally owned property for the Post Office. In that case one of the descendants of the original grantors of the property for public use appeared in the case objecting to the taking of the property, claiming it was destructive of the public use for which it had been dedicated by her ancestors. The Supreme Court adhered to the principle of the supremacy of a federal public use over all other uses and held that the power to select sites for the public Post Office facility rested with Congress and its agencies and that its determination on a site was not subject to a judicial review, saying at page 218: "The judgment exercised by the designated officials in selecting this site out of 22 sites suggested, and out of two closely balanced alternatives, constituted an administrative and *legislative decision not subject to judicial review on its merits.*" (Emphasis added.)

This court has consistently held as shown by its decision in *Rindge Co.* v. *Los Angeles County*, 262 U. S. 700, 67 L. Ed. 1186, 1193, heretofore cited that a hearing on the question of necessity of a taking as petitioners herein contend they were denied is not essential to due process in the sense of the 14th Amendment. Thus all petitioners really seek in this case is judicial review of the Board's decision to acquire the subject property for a school. This court in *Carmack* expressly ruled contrary to such contention and held that site selection is not subject of judicial review.

Petitioners also argue that the Board failed to make known its reasons for choosing the subject property in its present size and shape for a school site and this failure was denial of due process to them. It is a long established rule that the reasons or motives behind the determination of public bodies such as the Board are not the proper sub-

ject of judicial investigation as held in *Detroit United Railway* v. *City of Detroit,* 255 U. S. 171, 178, 65 L. Ed. 570, 576; *Soon Hing* v. *Crowley,* 113 U. S. 703, 710, 28 L. Ed. 1145.

CONCLUSION.

We respectfully submit that the Illinois Courts have correctly held the Board may acquire the subject property for a needed school site and that there is no severance damage. The petition fails to set forth a federal question of substance and for the above and foregoing reasons the petition should be denied.

Respectfully submitted,

JAMES W. COFFEY,
FRANK S. RIGHEIMER,
228 North La Salle Street,
Chicago, Illinois 60601,
Attorneys for Petitioner.

FRANK S. RIGHEIMER,
RICHARD E. GIRARD,
Of Counsel.

APPENDIX.

OPINION OF THE APPELLATE COURT
CASE NO. 51674

City of Chicago in Trust for the Use of Schools, Petitioner-Appellant v. Albert J. Schorsch Realty Company, Inc., et al., Defendants,

Consolidated With

City of Chicago in Trust for the Use of Schools, Petitioner-Appellant v. John Przywara, et al., Defendants-Appellees, Western National Bank of Cicero, etc., Defendant-Appellee.

Gen. No. 51,674.
First District, Fourth Division.
April 10, 1968.
Rehearing denied May 22, 1968.

Petitioner in eminent domain proceedings appeals from a jury award and judgment of $97,440 in favor of the owner of Parcel E—Western National Bank of Cicero, as Trustee under Trust No. 498. Defendant cross appeals from the denial of its motion to dismiss the complaint.

Petition instituted condemnation proceedings on March 4, 1965 (Circuit Court No. 65 L 7227) for five parcels of land to be used for school purposes. On July 14, 1965, another petition was filed in the same case seeking nine and one-half acres of unsubdivided land and one acre of subdivided property which consisted of eight lots designated as Parcel 4 and also referred to as Parcel E. On July 14, 1965,

another petition was filed in a new case (Circuit Court No. 65 L 20763) seeking the same property. In that case a change of venue was granted on November 3, 1965, as to Parcel 4, and the case reassigned for a separate trial as to Parcel 4. Thereafter the cases were consolidated.

This appeal by petitioner and the cross appeal of Western National Bank of Cicero as Trustee under Trust No. 498 (hereinafter referred to as defendant) emanates from the proceedings in the separate trial as to Parcel 4—also referred to as Parcel E.

In the consolidated case petitioner sought to condemn ten and one-half acres of land located in the vicinity of O'Hare Airport bounded by Cumberland Avenue on the west and Pittsburgh Avenue on the east. Balmoral Avenue was to the south and the city limits (close to Bryn Mawr Avenue) were the northern boundary. Defendant's eight lots fronted on Pittsburgh Avenue each with 58-foot frontage and a depth of 107.48 feet. The evidence showed that the property was zoned R-2, single-family residence, and each lot in the subdivision bore a covenant restricting it to such use.

On appeal petitioner's principal contention is that the conduct of defense counsel in closing argument was so prejudicial as to deny petitioner a fair trial.

Petitioner's Evidence

Herman O. Walther testified that he was a real estate appraiser with extensive experience and that he had taught real estate appraising. He said that there were many other areas in the City of Chicago still being developed for houses and that in the immediate vicinity of the subject property, just west of Cumberland Avenue, there were 100 vacant acres and three and one-half miles east of Pittsburgh Avenue there was an only partially developed new

home area. He stated that the highest and best use of the eight lots was for single-family residences and that each lot was worth $8,000.

Albert J. Schorsch, Jr. testified under subpoena. He stated that he and his family had been developing property in the area for about ten years, that eighteen months earlier one of the companies in which he and his family were involved sold a lot on the corner of Pittsburgh and Balmoral to another of the Schorsch companies for $9,000 and that this was not an arm's length transaction. He said that the lot was 60 feet wide and 124 feet deep but that the trend was toward building houses on lots 50 feet wide.

Raymond Cleveland stated that he was a real estate broker and that he had recently participated in the sale of a property 48 feet wide and 141 feet deep and within one-half mile of the subject property for the price of $7,500. He said that the lot fronted on Cumberland Avenue across the street from a large shopping center and three or four lots away from a gas station and that the houses in that area sold for between twenty and thirty thousand dollars.

Edwin J. Feulner testified that he was a broker, manager and appraiser of real estate and that he was familiar with the area of the subject property. He said that the highest and best use of the eight lots was R-2 single-family residences and that as such they were worth $140 per front foot ($8,120 for 58-foot frontage).

DEFENDANT'S EVIDENCE

Albert Schorsch, Jr. (who had also been called as a witness by petitioner) testified that his organizations were in competition with defendants and owned the property immediately south of defendant's subdivision. He said that the highest and best use of the subject property would be under R-3 general residence zoning. He then testified:

Under R-3 zoning you might be able to build one flat on each parcel of 2,500 square feet and on a lot 46½, maybe slightly larger than this, you could build a two flat. You could get nine total units out of that group of 8 lots and if you took into consideration the ownership of adjacent lots you could get 10 lots because all you need is one more front foot to make the 10th lot. I have an opinion of the fair cash market value of 10 such units as of July 15, 1965. I believe each of the units 46½ x 107.48, that each parcel that size would be worth $11,000 which works out to be $220—$225 a front foot. My opinion is the same if the zoning remains the same.

Frank Syms testified that he was an appraiser, broker, manager and financier of land transactions; that an area of land to the east of the subject property separated by one vacant parcel and Pittsburgh Avenue had been developed with homes ranging in value from $30,000 to $45,000 by the Schorsch interests, James C. Moreland and Son and the beneficial owners of the subject property and that there is a relationship between the value of vacant and improved property. He said that the highest and best use was for single-family residences and that each lot would have a value of $10,400 or $179 per front foot or a total of $83,200 for the eight lots. He stated that there was a scarcity of comparable sales because most developers sold property with houses as a complete package.

William F. Moreland stated that he was a broker and developer and was president of the company of James C. Moreland and Son which had developed property in the area. He testified that the highest and best use was single-family residences, that the fair cash value of the eight lots depended on whether their sale was separate or bulk, that the fair cash value was $11,000 to $14,000 per lot or $200 to $225 per front foot.

Raymond Peterson said that he was a builder and subdivider, that he was involved in a sale within a mile of the

subject property, the price was $251.87 per front foot for five lots, all of which were 125 feet deep and four of which were 25 feet wide with the fifth being 38 feet wide. He said there was no longer any vacant property in the immediate area of that sale. He testified that the highest and best use of the subject property was for single-family residences and that the fair cash value for the eight lots would be approximately $11,000 per lot or $220 to $225 per front foot. He admitted on cross-examination that he never walked around the subject property or bought or sold property within two or three blocks of it but that he had only driven by it.

OPINION

[1] Petitioner contends that prejudicial conduct of defense counsel in his closing argument so confused and prejudiced the jury that it was denied a fair trial. Walther testified that the eight lots were worth $8,000 per lot. Defense counsel argued to the jury that viewing Walther's testimony of $8,000 per lot with that of witnesses who testified to the possibility of making ten lots out of the property, that "even using Mr. Walther's valuation, the overall picture is $80,000 for this whole parcel." Walther never testified to what the lots would be worth if subdivided into ten smaller lots. Counsel used the same method in discussing the testimony of Feulner, Syms and Peterson who all valued the eight lots as then subdivided.

Petitioner also complains that counsel's argument that property which was sold on Cumberland was not comparable to the subject property because Cumberland is a "... high speed street with a rumble strip," was not based on any evidence in the case. The same is said of the argument that the jury should consider the difficulty of defendant's getting new land to continue this construction and

development business. Finally, complaint is made of a personal attack on petitioner's counsel.

Defendant, however, argues that the alleged errors are not properly preserved for review. The record shows that not one of the remarks complained of was objected to at the trial. In County of Cook v. Colonial Oil Corp., 15 Ill2d 67, 153 NE2d 844, the court said at page 75:

> Counsel for defendant also characterizes the closing argument of petitioner's counsel as "unfair, insulting, full of ridicule of respondent's witnesses and counsel, and so insinuating and vindictive as to be highly prejudicial to the respondent." First of all, counsel for defendant, who is admittedly experienced in condemnation, made no objection to any of the opening argument of counsel for petitioner and no objection to any of the supposedly objectionable remarks made by petitioner's counsel in his final argument. We have consistently held that experienced counsel cannot take a chance of failing to make objections and then, upon receiving what they consider an adverse jury verdict, claim error. (City of Chicago v. Vaccarro, 408 Ill 587.)

Furthermore, in its post-trial motion the petitioners said only: "The petitioner was prejudiced by the argument made by counsel for defendant to the jury." Illinois Revised Statutes, 1963, c 110, § 68.1, requires that the post-trial motion "contain the points relied upon, *particularly specifying* the grounds in support thereof. . . . A party may not urge as error on review of the ruling on his post-trial motion any point, ground or relief not particularly specified in the motion." (Emphasis supplied.) In Kortlander v. Chicago Transit Authority, 56 Ill App2d 48, 205 NE2d 516, it was held that unless the allegedly improper remarks were specifically set forth in the post-trial motion, no objection could be raised to them on appeal. See Lawler v. Pepper Const. Co., 33 Ill App2d 188, 178 NE2d 687; Perez v. B. & O. R. Co., Ill App2d

204, 164 NE2d 209; Richman Chemical Co. v. Lowenthal, 16 Ill App2d 568, 149 NE2d 351.

In the instant case the verdict was "within the range of the evidence." Chicago Land Clearance Commission v. Darrow, 12 Ill2d 365, 146 NE2d 1. There was evidence that that eight lots were worth $11,000 to $14,000 per lot and that the 464 feet were worth between $200 and $225 per front foot. In fact, in discussing the post-trial motion the trial judge said:

> There isn't any question that this jury valued this property, 464 feet at $210 a foot, which multiplied comes out to $97,440 to the penny. I don't think they ever considered it as ten sites as such. If they did, they would have come out with $9,744 a building site, and juries don't do that.
>
> In my opinion, this verdict is within the realm of the evidence, and I don't think there is, as far as I am able to observe—and I don't think there is any error in the record.

In view of petitioner's uniform failure both to object at the trial and to specify in the post-trial motion, and since the verdict is within the range of the evidence, the judgment is affirmed.

CROSS-APPEAL

Defendant contends in its cross-appeal that its motion to dismiss should have been sustained because (1) the taking was an abuse of the School Board's power in that the proposed site for school purposes was in a flight zone for aircraft using O'Hare Field, and (2) the statutory prerequisites wre not fulfilled.

HEARING ON TRAVERSE AND DEFENDANTS' MOTION TO DISMISS

DEFENDANT'S EVIDENCE

Saul Samuels was called by defendant under section 60[1] and testified that he knew of no schools built within a flight zone in the last four years but that he did not have sufficient information to say that none was built.

Francis B. McKeag, assistant superintendent of schools, testified under section 60 that there would eventually be plans for a school on the site although he did not feel there then existed any specific plans. He said, "We will serve a ¾ mile radius from this location in all directions so far as Kindergarten through 6th grade is concerned. 1¼ miles as far as 7th and 8th grades are concerned and when a high school is placed on this location it would serve a 1½ mile radius." He stated that the northern boundary of the proposed school site was also the northern boundary of the City of Chicago, that due to the inadequacy of present facilities the Board of Education was forced to pay tuition fees for 120 students from this area to another school system and that this school system had told the board last spring that it would no longer have room for these students. He admitted, however, on cross-examination that a report of the General Superintendent of Schools said that the school in District 1, the district here involved, were capable of receiving more students.

Joseph P. McMahon, assistant real estate agent of the Board of Education, testified under section 60 that he was visited by defendant's lawyer; that he did not know whether the lawyer came in response to the letter containing the offer of purchase; that the lawyer did not present the letter; that he did not tell the lawyer what the offer

1. Ill Rev Stats, 1963, c 110, § 60.

was; that the lawyer only stated that his people were not happy about it and that he told the lawyer that he (McMahon) had no authority to change the offer.

John Duba, Commissioner of Development and Planning, testified that the Chicago Plan Commission was not consulted on this project.

PETITIONER'S EVIDENCE

Francis B. McKeag testified that because of the decision of the Pennoyer School Board to stop receiving the 120 students from this area, the Chicago Board of Education was forced to place four mobile classrooms on the corner of Balmoral and Cumberland. He said that in the last ten years the city had annexed a considerable amount of territory requiring the acquisition of a school site in the general area.

Frank G. Lappas testified that he was an aeronautical consultant with a degree in civil engineering, that he had been a consultant to companies throughout the nation on matters pertaining to air hazards as well as to property owners planning on the use of land in the vicinity of airports, that he had appeared before the Federal Aviation Agency on numerous occasions, that he had studied the rules and regulations of various bodies having to do with airports throughout the country, and that he was familiar with O'Hare. He stated that there were a variety of safety zones around airfields and that this property was within O'Hare's instrument approach zone but not within the control zone. He said that the subject property was 15,000 feet from the end of the runway and 1,400 feet off the extended center line of the runway and that a two-story building would constitute no hazard and violate no pertinent regulations he knew of.

OPINION

[2, 3] In its cross-appeal defendant first contends that the taking is an abuse of power and the petition should have been dismissed. The general rule is stated in Trustees of Schools of Township 37 North, Range II, Cook County v. Sherman Heights Corp., 20 Ill2d 357, 169 NE2d 800, at page 360:

> The question of necessity for taking by eminent domain for public use is legislative and its determination is within the discretion of the corporate body vested with the power to exercise the right. [Cases omitted.] Such a determination will be disturbed by the courts only where there has been an abuse of power violative of constitutional rights. [Cases omitted.]

Petitioner introduced testimony that ten years of annexation by the City of Chicago had created the need for new school facilities in the area, first met by paying tuition for 120 students in the schools of a nearby community and later by the erection of four mobile classrooms. Defendant, however, says that the school board abused its power in attempting to construct a school in what it terms the "flight zone" around O'Hare Airport when such action is expressly disapproved by the zoning regulations for the Chicago-O'Hare International Airport. Section 2 of these provisions provides:

> Land Use Restriction Zone—In that portion of the approach zone at each end of each instrument and non-instrument runway as indicated on the zoning map, is hereby established an area hereinafter referred to as the land use restriction zone. The land use restriction zone shall have a width of 1,000 feet at a point 200 feet from the end of each runway widening thereafter uniformly to a width of 4,000 feet at *a distance of 10,200 feet* from the end of each

> runway. Any land use established within the land use restriction zone subsequent to the effective date of these zoning regulations shall be subject to the control of the affected political subdivision. To the extent where feasible, such political subdivision shall discourage further development of residential buildings and places of public assembly involving educational, institutional, amusement, and recreational uses. [Emphasis added.]

The evidence shows that the subject property is 15,000 feet from the end of the runway and therefore outside the land use restriction zone. Moreover, the only testimony on the actual hazards involved was given by petitioner's witness Lappas, an aeronautical consultant, who stated that the placement of a school on the subject property would not constitute a safety hazard and would not violate any regulations he knew of.

[4, 5] Defendant also argues that petitioner voluntarily dismissed two prior suits to condemn nearby property because that property was in a "flight zone." Defendant claims that it relied on these actions to its detriment and that petitioner is therefore estopped from taking the subfeet property citing Hickey v. Illinois Cent. R. Co., 35 Ill2d 427, 220 NE2d 415. Defendant produced a document purporting to be a recommendation of the General Superintendent of Schools that one of the condemnation suits be dismissed because the property to be condemned was in a flight zone. However, there was no evidence whatsoever as to the reason for the dismissal of the other suit. Furthermore, there was no evidence defining a "flight zone" or showing that the subject property in the instant case was within it.[2] Finally, defendant failed to show that the ex-

2. The only evidence identifying and explaining the different zones that surround an airport was provided by petitioner's expert, Frank Lappas. He said the "instrument approach zone" was 500 feet on each side of an extended center line of a runway projecting

penditures it made in improving the property in reliance on these dismissals will not be reflected in the property's value and will be lost to it. In these circumstances we find no basis for the conclusion that petitioner is estopped from taking the subject property. See generally Chicago, St. L. & W. R. Co. v. Gates, 120 Ill 86, 11 NE 527.

Defendants' second contention in their cross-appeal is that petitioner failed to fulfill conditions precedent to the filing of condemnation proceedings. First, defendant argues that there was no good faith attempt on the part of petitioner to negotiate with the landowners and no refusal on their part to agree on a valuation. The general superintendent of Chicago schools sent defendant a letter making an offer of $40,000 for the property. The letter stated that the general superintendent had been empowered by the School Board to negotiate but that if discussion was desired Mr. Fred Arnholt of the Board of Education should be contacted first. Defendants produced evidence only that their lawyer talked to Joseph McMahon of the Board of Education's real estate office, but that he made no counter offer and no request to discuss this with the Superintendent. The lawyer merely said his clients were dissatisfied with the offer, to which Mr. McMahon replied that he had no authority to change it. We believe there was sufficient offer and attempt to negotiate. See County Board of School Trustees of Macon County v. Batchelder, 7 Ill2d 178, 130 NE2d 175; County of Mercer v. Wolff, 237 Ill 74, 86 NE 708.

[6] Defendant also contends that the School Board's failure to contact the Chicago Plan Commission before it sought to condemn prevents a valid condemnation. Illinois

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out to 50,000 feet at which point the width of the zone was 16,000 feet and that the subject property fell within this zone. He mentioned but did not define the "non-instrument approach zone." Adjacent to the two zones are "transitional zones." Lappas also stated that there were conical surfaces and outer conical surfaces. He did not testify that any of these above were hazard zones, nor did he mention the term "flight zone."

Revised Statutes, 1965, chapter 24, section 11-12-4.1, reads as follows:

> Whenever a municipality of more than 500,000 population has created a plan commission pursuant to the provisions of this Division 12, every plan, design or other proposal by any public body or agency which requires the acquisition or disposition of real property within the territorial limits of the municipalty by any public body or agency, . . . shall be referred to the plan commission by such public body or agency not less than 30 days prior to any election for the purpose of authorizing the borrowing of money for, or any action by such public body or agency to appropriate funds for, or to authorize such changes or the acquisition or disposition of such real property, but in no event shall such referral be less than 30 days prior to making such changes or acquiring or disposing of such real property. The plan commission shall review every such plan, design or other proposal and shall within 30 days after submission thereof report to the public body or agency having jurisdiction over such real property or improvement thereon concerning the conformity of the plan, design, or other proposal with the long range planning objectives of the municipality and with the official plan for the municipality or any part thereof if the same shall then be in effect as provided in Section 11-12-2. Such report shall be spread of record in the minutes or record of proceedings of such public body or agency. A report that any such plan, design, or other propoasl is not in conformity with the long range planning objectives of the municipality, or the official plan for the municipality shall be accompanied by a written statement of the respects in which such conformity is lacking but such a report shall not bar the public body or agency having jurisdiction over such real property or improvement thereon from thereafter making such changes or acquiring or disposing of such real property. . . .

The statute expressly provides that the plan commission's disapproval does not bar the proposed action. We believe

that the statute taken as a whole indicates that the requirement of submission to the plan commission is not mandatory and failure to submit the proposed action to the commission does not bar condemnation.

[7, 8] Defendant asserts the court erred in sustaining petitioner's objections to an interrogatory requesting a list of all persons who were directed by the board to inspect the property. The petitioner claimed that the names were privileged and not subject to disclosure relying on Chicago v. Harrison-Halsted Bldg. Corp., 11 Ill2d 431, 143 NE2d 40 which held that the reports of appraisers were privileged. However, we believe that under the broad discovery principles of Monier v. Chamberlain, 35 Ill2d 351, 221 NE2d 410, the names of appraisers are not privileged. Nevertheless, under the circumstances we deem this to have been a harmless error.

[9, 10] Defendant also contends that errors were committed in the pretrial discovery proceedings with regard to the disposition of six answers to defendant's notice to admit facts. Petitioner responded to the questions by denying knowledge sufficient to answer the questions and at the same time asserting that they were irrelevant and immaterial. Defendant complains that its motion to strike those parts of petitioner's answers asserting that the questions were irrelevant and immaterial was erroneously denied. Supreme Court Rule 216, Illinois Revised Statutes, 1965, chapter 110A, section 216, formerly Rule 18, requires that the questions be either answered or objected to or that a explanation of why they cannot be answered must be given. Petitioner should not have been able to both answer and object simultaneously to the same matter. The motion to strike those portions of the answers which amounted to objections should have been granted. However, this error could not prejudice defendant and cannot be the basis of a reversal.

[11] Defendant also urges that those portions of the answers asserting inability to answer were specious and not made in good faith and that denial of its motion that petitioner be deemed to have admitted answers favoring the movant was error. We sympathize with petitioner's inability to answer some of the these questions because the maps provided by defendant fail to show what defendant asserted they showed and did not contain the material necessary to answer the questions. Furthermore, failure to deem these answers admissions could not have substantially prejudiced defendant's case. Some of the questions dealt with whether the subject property and other property which had been the subject of condemnation suits were within an instrument approach zone within the meaning of the 1965 Revised Code of Federal Regulations, Title 14, c 1, § 77-27. The evidence ultimately showed that these properties were within the zone. Thus failure to deem these facts as admitted could have had no prejudcial effect. See Braswell v. New York, C. & St. L. R. Co., 60 Ill App2d 120, 208 NE2d 358. Moreover, section 77-27 does not characterize these zones as hazard zones and has no bearing on the case. (Section 77.23 entitled "Standards for Determining Obstructions" defines hazard areas. There was no showing that this property was within a hazardous area either under section 77.23 or the O'Hare Zoning Regulation, supra.) The remaining questions were also substantially answered by the evidence but again failed to have any significant bearing on important issues in the case. Failure to deem these answers admissions was not reversible error.

Finally, we find no error in the trial court's refusal to direct an answer to a question propounded during a discovery deposition.

In view of the foregoing, the judgment of the Circuit Court is affirmed.

Affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1411

CITY OF CHICAGO IN TRUST FOR THE USE OF SCHOOLS,

vs.

ALBERT J. SCHORSCH REALTY CO., INC., ET AL.,

NATIONAL BANK OF ALBANY PARK IN CHICAGO, AS TRUSTEE UNDER TRUST No. 11-1030, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO EXCHANGE NATIONAL BANK OF CHICAGO AS TRUSTEE UNDER TRUST No. 15166; AND LA SALLE NATIONAL BANK OF CHICAGO, AS TRUSTEE UNDER TRUST No. 35232, SUCCESSOR IN INTEREST TO JOHN PRZYWARA AND JOSEPHINE PRZYWARA, HIS WIFE,

Petitioners,

Consolidated with

CITY OF CHICAGO IN TRUST FOR THE USE OF SCHOOLS,

vs.

JOHN PRZYWARA, ET AL.,

NATIONAL BANK OF ALBANY PARK IN CHICAGO, AS TRUSTEE UNDER TRUST No. 11-1030, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO EXCHANGE NATIONAL BANK OF CHICAGO AS TRUSTEE UNDER TRUST No. 15166; AND LA SALLE NATIONAL BANK OF CHICAGO, AS TRUSTEE UNDER TRUST No. 35232, SUCCESSOR IN INTEREST TO JOHN PRZYWARA AND JOSEPHINE PRZYWARA, HIS WIFE,

Petitioners.

REPLY BRIEF.

JOHN B. MURNIGHAN,
GREEN, MURNIGHAN & KANE ASSOCIATES,
228 North LaSalle Street,
ST 2-0293,
Chicago, Illinois 60601,
Attorney for Petitioners, National Bank of Albany Park in Chicago, as Trustee Under Trust No. 11-1030, Individually and as Successor in Interest to Exchange National Bank of Chicago as Trustee Under Trust No. 15166; and La Salle National Bank of Chicago, as Trustee Under Trust No. 35232, Successor in Interest to John Przywara and Josephine Przywara, His Wife.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

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Petitioners.

REPLY BRIEF.

Now come the petitioners, who respectfully pray a writ of certiorari issue in this cause and, to the new matters raised by respondent, Board of Education of the City of Chicago in its answer, reply as follows:

I. TRANSFER ORDER DOES NOT WAIVE CONSTITUTIONAL ISSUE.

Respondent Board, commencing on page 8 of its answer, refers to a transfer order by the Supreme Court of Illinois of these petitioners' initial appeal from the trial court, inferring such transfer order constituted a ruling that no constitutional issues were involved in this case. Such transfer order was made under the Illinois Supreme Court Rule 365 (formerly Rule 28-1) which specifically provides:

> "Effect. The taking of an appeal to either the Supreme Court or the Appellate Court shall not be deemed a waiver of the right to present any issue to the appropriate court. A matter decided by either court shall not be subject to collateral attack on the ground that it should have been decided by the other."

Ill. Rev. Stat. (Ill. Bar Assoc. Ed. 1969), Chap. 110 A, Sec. 365 (A). The Illinois Supreme Court under this rule transfers to the Appellate Court any case which it feels does not involve a constitutional question of broad general interest.

II. PETITIONERS WERE ADJUDGED ENTITLED TO A HEARING ON MOTIONS.

Initially respondent Board claims that the same issue in Petitioners' motions to dismiss has been decided in this case, involving different property and different defendants who raised the same motions through the same attorney before a different trial judge in which there was a full hearing. The same contentions were presented to the Appellate Court by respondent Board when it first appealed in this instant case (App. A-2; case number 51710). The court there said (p. A-5):

> "We know of no 'well established law in Illinois' which prevents owners of property from challenging the

condemnor's right to proceed simply because they make the same arguments through the same attorneys as were made by another party in a different suit tried by a different judge. Certainly the fact that different properties and different parties were involved prevents the application of the principal of res adjudicata. We believe that defendants were entitled to a hearing on the petitioner's right to condemn."

III. CALIFORNIA LAW DOES NOT APPLY.

Respondent Board then, attempts substantially to contend that the law is clear there is no necessity for a hearing, citing *Rindge Company, et al.* v. *County of Los Angeles,* 262 U. S. 700, involving a condemnation by the County of Los Angeles, California under its peculiar statute which this court clearly distinguished, where it said on page 702 of 262 U. S.:

> "Section 1241, as amended in 1913, provides that before property can be taken it must appear that the use to which it is to be applied is one authorized by law and that the taking is necessary to such use; provided, inter alia, that when the legislative body of a county has by resolution adopted by vote of two-thirds of its members, found and determined that the public interest and necessity require the construction by the county of any proposed public improvement located within its limits and that designated property is necessary therefor, such resolution shall be 'conclusive evidence' of the public necessity for such improvement, that such property is necessary therefor, and that such improvement is located in the manner most compatible with the greatest public good and the least private injury. Stats. 1913, p. 549."

The law in Illinois is clear that an owner is entitled to a hearing at some stage of the court proceedings. The procedure in Illinois as quoted on page 19 of Respondent Board's answer in the case of *City of Chicago* v. *Vacarro,* 408 Ill. 587, 596, 97 N. E. 2d 766, is: